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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Notice of Ex Parte Communication
Review of Local Radio Ownership Rules - Embedded Radio Markets
MB Docket Nos. 09-182 and 14-50

Dear Ms. Dortch:

On May 4, 2017, Connoisseur Media, LLC ("Connoisseur") conducted several meetings with Commission personnel to discuss the above-referenced matter. Specifically, Jeff Warshaw and Mike Dufort of Connoisseur, and David Oxenford and Kelly Donohue of Wilkinson Barker Knauer LLC met (in the following order) with (1) Robin Colwell of Commission O'Rielly's office; (2) Alison Nemeth of Chairman Pai's office, and (3) David Grossman of Commissioner Clyburn's office.

During each of these meetings, Connoisseur and its counsel addressed the issues that it has pursued throughout the above-referenced proceeding, changing the treatment under the Commission's multiple ownership rules of radio stations that are home to embedded markets in major metropolitan areas. Embedded markets are the only Nielsen markets where owners, in the context of any acquisition of new stations, have to meet the multiple ownership requirements in two markets – the embedded market itself, and the greater "parent" market. While this policy was adopted to prevent the central city stations at the core of the parent market from also acquiring multiple stations in the embedded markets (as those stations from the core of the market do compete for advertising dollars in the embedded markets), it has the perverse effect of preventing stations home to the embedded markets (which do not compete in the overall parent market) from buying stations in other embedded markets, as the ownership interests in each embedded market will be aggregated in the ownership analysis of the parent market – putting an owner who tries to acquire multiple stations in more than one embedded market over the ownership cap in the parent market. This occurs even though stations in one embedded market do not compete with stations in other embedded markets, nor are stations home to the embedded markets a competitive factor in the parent market. By stopping an owner in one embedded market from acquiring stations in other embedded markets in the same parent market, it precludes the embedded market owner from amassing any scale to compete for regional and national advertising dollars with the core stations that take much advertising revenue out of the embedded markets. This drives down the revenues of the embedded market stations, leaving these stations with less money to spend on local programming that will serve the needs of the residents of the embedded markets – needs largely ignored by the stations located in the core of the parent markets. As detailed below, Connoisseur pointed to the wealth of evidence it has provided in this proceeding supporting its position.

What Connoisseur is seeking in this proceeding is the FCC recognition that stations that are home exclusively to an embedded market be either exempted from the dual multiple ownership analysis, or that the Commission adopt a presumption that the dual analysis need not be conducted as long as some objective test demonstrates that a station's designation as "home" to an embedded market is not in some way disguising a station that really is competitively serving the greater parent market in the manner that those stations home to the core of the parent market do. [1] Connoisseur has suggested either a presumptive waiver of the rules for an owner of stations home to embedded market which that owner seeks to acquire stations in other embedded markets, or the reliance on the "contour method" used in the nonrated markets to show that a combination does not propose a competitive threat in the greater parent market. In the meetings, Connoisseur noted that the NAB has commented in support of Connoisseur's Petition for Reconsideration of the August order of the FCC in this docket, and suggested what appears to be a very simple and objective test. The NAB has suggested that if an embedded market station does not place coverage contour over 50% of the parent market, it should not also count in a multiple ownership analysis of the parent market when evaluating combinations between stations in different embedded markets. Connoisseur supports the NAB suggestion as few embedded market stations come close to serving any substantial portion of the parent market.

This objective standard is needed to ensure that parties can do acquisitions in embedded markets to improve the competitive posture of stations in those markets. Connoisseur noted that station sellers simply do not want to face the uncertainty of a case-by-case waiver approach. Any sale of a station imposes significant tensions on the operation of that station – as advertisers and staff are uncertain of what changes will be made after the sale. Business relationships can be significantly disrupted by any period of uncertainty. A case-by-case waiver, where no standards have been set forth as to how the waiver would be evaluated, and where the Commission has not even acknowledged the existence of a problem, simply imposes so much uncertainty as to whether a deal would be approved, and how long any consideration would take, to make any deal possible.

[1] In its comments filed in the Quadrennial Review, Connoisseur first advanced this position. In the August order resolving the Quadrennial Review, the Commission refused to acknowledge that the dual consideration did not serve the public interest. The Commission instead suggested that waivers could be approached on a case-by-case basis, but provided no standards under which those waivers would be judged. Connoisseur sought reconsideration of that decision.

Connoisseur argued that the Commission's determination in the August order cannot stand, as that decision leaves in place this regulatory burden on embedded market station operators which serves no public interest goal, and which economically harms the stations that provide the most local service to the people who live in these embedded markets.

Significantly, there has been absolutely no opposition to Connoisseur's proposal in this docket. No reply comments addressing Connoisseur's proposal were filed in the Quadrennial Review after Connoisseur proposed this idea in its initial comments. No ex parte statements opposing this idea were filed prior to the August order (and two other broadcasters with interests in embedded markets filed supporting comments). And there has been no opposition filed to Connoisseur's Petition for Reconsideration. In fact, only the NAB has addressed the Petition for Reconsideration, advancing its suggestion for a simple test to effectuate Connoisseur's proposal. Given the lack of opposition, Connoisseur suggested in the meetings on Thursday that the embedded market issue could be parsed out from the more contentious issues raised in the ownership proceeding and immediately acted on by the Commission, without any further solicitation of comments. There simply is no dispute about the issue.

In fact, the only opposition to the Connoisseur proposal was that expressed by the FCC in the August order. Even though Connoisseur provided substantial evidence that stations in one embedded market do not compete with stations in other embedded markets, and embedded market stations are not competitive threats in the parent market, the Commission summarily rejected the Connoisseur proposal in its *Second Report and Order*. The Commission offers only three reasons for its rejection of the Connoisseur proposal none, of which withstand scrutiny. The reasons offered were: (1) Connoisseur hadn't sufficiently demonstrated that the embedded markets do not compete in the parent market; (2) Connoisseur did not include data about the markets embedded in the Washington, DC market, and (3) the FCC's approach is consistent with the way Arbitron (now Nielsen) has always treated embedded markets.

In its meetings with Commission staff, Connoisseur argued that, contrary to the Commission's assertion in the *Second Report and Order*, extensive data has been submitted to support the conclusion that stations in embedded markets do not compete in the parent market. The arguments set out below conclusively establish that these stations are not competitive forces in the parent markets. Connoisseur's showing included:

- Ratings data demonstrating that if a broadcasters were to own every one of the over 80 stations home to embedded markets considered part of the New York City parent market, that owner would still only be in 4th in the parent market, with only a 13.6% audience share, about half the market share of the two largest owners of stations in the parent market. Anything approaching such an impact in the parent market simply from the aggregation of embedded market stations would be impossible for various reasons, including primarily that the this level of ownership would far exceed the audience caps in each of the embedded markets. In the two largest embedded markets, Nassau/Suffolk (Long Island) and the Hudson Valley, there are 78 stations. Under the local ownership caps in each of those markets, no owner could own more than 7 stations in each market, leaving 64 other stations that would have to be independently owned. This alone demonstrates that aggregating embedded market stations cannot lead to any competitive imbalance in the parent NY market and belies any claim that Connoisseur did not conclusively demonstrate that the embedded market stations do not meaningfully compete in the parent market; [2]

- While that initial showing should be enough to demonstrate the fallacy of the conclusion reached in the August order, Connoisseur also showed that the low ratings in the parent market are not a function of these embedded market stations not trying to compete in the larger parent market or not adopting competitive formats. Instead, the inability to compete in the parent market is based on signal coverage which precludes any of these stations from reaching most of the audience in the parent market. Connoisseur has demonstrated that most embedded market stations cover less than 25 percent of the population of the parent market with a 1 mv/m signal, and only a handful cover just over 50%, while FM stations in the core of the market cover over 80% of the market; [3]

- In the meetings, Connoisseur noted that the NAB's suggested test for whether an embedded market station competes in the parent market would preclude stations from changing their competitive posture by changing transmitter sites, as they would have to continue to demonstrate that they meet the coverage test proposed by NAB.[4]

As to the second fault mentioned in passing in the August order, Connoisseur explained that it had not initially included detailed data on the embedded market stations in the Washington DC parent market as it assumed that FCC decision makers based in DC would necessarily know that radio stations based in Frederick, Maryland, do not compete with stations in Fredericksburg, Virginia (the two embedded markets within the DC market). Similarly, it assumed that people at the FCC would know that stations home to Frederick and Fredericksburg do not compete in the core of the DC market. While Connoisseur assumed these facts were self-evident or could be

[2] *See* Petition for Reconsideration at pp. 4-5 and at footnote 10.
[3] *See* Petition for Reconsideration at p. 7 and at footnote 11.
[4] In fact, some stations would be precluded from moving closer to the center of the market because there are other embedded market stations on the other side of the city on the same channel. At the meetings, Connoisseur argued that different stations on the same channel can meet co-channel mileage separations demonstrates how far apart these stations are and that they cannot possibly compete with each other.

easily verified by FCC personnel, it noted at the meetings that it would supplement the record to document these propositions.[5]

On the final argument, that Nielsen has always treated stations in embedded markets as being also home to the parent market, Connoisseur argued at the meetings that, just because Nielsen has done it that way for commercial purposes, does not mean that the FCC should have adopted that treatment for multiple ownership purposes. This treatment was adopted by Nielsen as the stations in the core of the market wanted to be able to claim to advertisers that they serve a larger market including the people who reside in the counties in the embedded markets. It was never the intent of Nielsen to claim that the stations in the embedded markets had a competitive impact in the parent market, as they demonstrably do not.

When the embedded market rules were first applied for multiple ownership purposes, it was done without any significant comment from the public. Only one party suggested that the routine attribution of embedded market stations to both the embedded market and the parent market did not make sense, but that party provided no data to back up its assertion. Given the wealth of data provided by Connoisseur in this proceeding, the mere fact that the Commission adopted the wrong policy in 2003 should not preclude it from correcting that error a decade and a half later.

This correction is important for competitive reasons. As Connoisseur explained at the meetings, because the stations in the core of the parent market can claim that they compete in the embedded markets (and in fact are competitive because of their larger, more centralized coverage), these core stations suck advertising dollars out of the embedded markets. This revenue pulled out of the embedded markets by the core stations leaves the stations actually located in the embedded markets with significantly less revenue per listener than in comparable sized markets.[6] Only by allowing embedded market owners to consolidate stations in multiple embedded markets can these stations appeal to the regional and national advertisers who currently are relying on these core stations to reach embedded market listeners.

It is important that these embedded market stations be allowed to compete more efficiently. Connoisseur stated that embedded market stations, not the core city stations, best

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[5] There are only four parent markets with embedded markets, and only in New York and Washington DC are there multiple embedded markets where the issue raised by Connoisseur arises. In the conversation with Mr. Grossman, Connoisseur pointed out that in markets such as Los Angeles, there are markets that are immediately adjacent to each other, where an owner can own a full complement of stations as this dual counting does not arise. For instance, the Riverside-San Bernardino and Oxnard-Ventura markets are immediately adjacent to Los Angeles, yet one owner could own a full complement of stations in each of those three markets. In the independent markets of Pensacola and Mobile, a number of stations in each market share the same tower, yet are considered to be in different markets allowing one owner to own the maximum number of stations in each of these markets.

[6] *See*, Connoisseur June 7, 2016 *ex parte* filing at Exhibit 3, where a comparison of the radio advertising revenue in the embedded markets to the revenue in similarly-sized markets that are not embedded, is provided.

serve their local communities. Local stations provide local programming. The New York stations will cover the Mets and the Yankees, and cover New York City traffic and New York City events, while Connoisseur stations in embedded markets broadcast local sports, cover local traffic, and help the community, such as raising money for local food banks and other local organizations.

Connoisseur also emphasized the importance of making these rule changes now – without waiting for any additional public comment or other further regulatory proceedings. Connoisseur relayed the tremendous competitive threats now faced by broadcast radio. It noted that broadcasters are competing with streaming services, and that companies like Google and Facebook have local advertising revenue many times over that of the broadcasters. As there are so many new competitors, this is a crucial time for radio to efficiently compete against its new rivals. Only by removing artificial barriers to efficient competition can radio stations compete against other media. This is even more important when, as here, those artificial barriers have no legal or marketplace justification.

Should there be any questions concerning this matter, please contact the undersigned.

Sincerely,

David Oxenford /ul

David Oxenford
Counsel to Connoisseur Media, LLC

cc: Robin Colwell (Legal Advisor to Commissioner O'Rielly)
Alison Nemeth (Legal Advisor to Chairman Pai)
David Grossman (Legal Advisor to Commissioner Clyburn)